A

AH POON & ORS

v.

PP

B

HIGH COURT MALAYA, IPOH
VT SINGHAM J
[CRIMINAL REVISIONS NO: 43-20-05, 43-21-05,
43-22-05 & 43-23-05]
15 OCTOBER 2005

C

CRIMINAL PROCEDURE: *Accused - Rights of accuseds to proper interpreter - Accuseds of Thai Origin - Policeman directed to be interpreter - Whether an irregular and improper exercise - Accuseds deprived of a certified Thai interpreter - Whether a breach of a substantive right of*
D *doctrine of procedural fairness*

CRIMINAL PROCEDURE: *Accused - Police report - Contained serious allegations - Whether highly prejudicial and inadmissible - Whether contents of police report explained to the accuseds - Whether accusations*
E *relevant to the charge - Whether ought to have been disallowed or rejected by Magistrate*

CRIMINAL PROCEDURE: *Charge - Defective charge - Charge contained two distinct offences - Whether a duplicity of offence - Wording of charge - Whether misleading - National Registration Regulations 1990,*
F *s. 25(1)(e) - Whether accuseds could not plead guilty to a charge which was confusing - Whether charge bad for duplicity - Whether accuseds prejudiced - Criminal Procedure Code, s. 163*

CRIMINAL PROCEDURE: *Revision - Magistrate's decision - Plea*
G *of guilty of accuseds - Whether unsafe to sustain - Whether conviction constituted a miscarriage of justice - Whether charge against accuseds unsustainable - Retrial - Whether to be ordered - Whether not in the interest of justice to order retrial*

H

The four applicants (hereinafter referred to as 'the accuseds') who were of Thai Origin were charged on 30 September 2005 at the Magistrate's Court for (1) being in possession of false National Registration Identity Card and (2) making use of forged National Registration Identity Card. All the four accused seemed to have
I pleaded guilty to the charge which was read, purported to have been explained and understood and supposedly to be in Thai language. The Magistrate accepted the plea of guilty, found them guilty and convicted them of the offence as charged. All the four

accuseds were sentenced to five months imprisonment with effect from the date of the arrest on 22 September 2005 and fined a sum of RM3,000 in default three months' imprisonment. However, this court called for the record of proceedings from the Magistrate's court with a view to consider the complaint and the correctness of the procedure and its said decision. Subsequently, this court found that there was basis for the complaint and requested the counsel for the accuseds and the deputy public prosecutor to attend court on 13 October 2005 with the view to address and assist this court on the complaints raised. The four accuseds were also present in court. Counsel for the accused submitted that (i) the accuseds were not provided with a certified Thai interpreter and instead a policeman was instructed by the Magistrate to act as an interpreter; (ii) the accuseds did not understand the interpreter and therefore they did not understand the charge when it was read to them; (iii) the nature and consequences of the plea was not explained to the accuseds and neither were they informed of the sentence provided by law; (iv) the accuseds, being foreigners, should have been informed of their right to have a counsel and the nature and consequences of their plea should have been explained to them; (v) there were no facts presented by the prosecution to support the charge and (vi) he urged upon this court to quash the conviction and set aside the sentence. The deputy public prosecutor conceded that the interpreter was a policeman and he was not aware whether he was a qualified interpreter. He further conceded that there was nothing in the record to show whether the nature and consequences of the plea of guilty was explained to the accused and that there were no facts to support the charge. However, he urged upon this court to order a retrial and remit the case back to the Magistrate's Court.

Held (quashing conviction of the four accuseds):

(1) It was an irregular and improper exercise for the Magistrate to have directed a policeman who was not a certified interpreter to interpret the charge to the accuseds of Thai origin. Such a practice was unsatisfactory and could not be condoned. First, the accuseds must understand the interpreter and vice versa and the Magistrate ought to have ascertained this facts from the accuseds through the interpreter. Secondly, whenever a charge is framed in the language not understood by the accused and he or she is present in person, it shall be interpreted and explained to

him or her in the language which he or she understands. Thirdly, the plea must be completely unequivocal, unreserved and unqualified. Fourthly, the nature and consequences of the plea and the punishment provided by law must be explained and in the language which the accused understand and must be understood by the accused especially in the instant case where the accuseds were foreigners. (para 10)

(2) The accuseds were not given an opportunity to explain or state if there were any extenuating circumstances under which the offence was alleged to have been committed and the position in which they were placed at the place of incident when they were arrested by the police. Accordingly it was the duty of the Magistrate to have ascertained from the accuseds who were unrepresented by counsel, evidence of antecedents, the background of the case and character of the accuseds before proceeding to mete out the punishment. (para 10)

(3) There was nothing in the record to show that the accuseds were asked whether they understood the policeman who acted as an interpreter bearing in mind the provision for a certified interpreter was a right which was given to them under the law and there should be no departure from this settled practice and law. To deprive the accuseds of a certified Thai interpreter who was able to interpret the plea taken from the accuseds and the mitigation plea for the consideration of the court was a serious matter and could not be taken lightly. It constituted a breach of a substantive right which formed part and parcel of the doctrine of procedural fairness. (para 11)

(4) In cases where a police officer was called or invited to act as an interpreter, it was desirable for the Magistrate to satisfy herself that the police officer was not conversant or familiar with the material facts of the case or had taken a role in any manner or in any part of the investigation before he was ordered to take the oath of an interpreter under Oaths and Affirmations Act 1949. Unfortunately, this exercise was not carried out by the Magistrate. In the circumstances, the Magistrate ought to have postponed the case when there was no certified Thai interpreter on that date even if there was a possible administrative convenience being caused if the case was postponed to call for a certified Thai

interpreter instead of having made use of a policeman who may possibly have an interest in the outcome of the case. Administrative inconvenience or difficulties to obtain the services of a qualified and certified Thai interpreter should not be a ground to disregard the requirement of justice to provide the accused persons with a qualified and certified interpreter of a dialect which he or she would be able to communicate with the accuseds before recording the plea of the accuseds. (paras 12 & 13)

(5) As for the police report which contained serious allegation that the accuseds were suspected to be involved in the activity of prostitution, it could not be denied that this was highly prejudicial, inadmissible or was otherwise objectionable. The accuseds have every right to know and understand the contents. They should be given the opportunity of raising any objection to the contents which was against them. Here, there was nothing in the record to show whether the contents of the police report which had been marked as exh. P3 was read and explained to the accuseds and what was their response. (para 17)

(6) The accusation in the police report that the accuseds were involved in the activities of prostitution was improper and not relevant to the charge and ought not to have been introduced as part of the prosecution case and instead ought to have been disallowed and rejected by the Magistrate. It was an automatic duty on the part of the Magistrate to remind the prosecution of its duty to ensure that only evidence which were admissible and relevant in law should be tendered as evidence whether by oral or documentary evidence. This was of fundamental importance to the administration of criminal justice that an accused person should feel that he has not been deprived of a fair trial. (para 19)

(7) In cases where the accused was not represented by counsel, the Magistrate must in addition and at all times be vigilant to ensure that highly prejudicial, inadmissible and irrelevant facts or matters were not introduced into the prosecution case. It was the duty of the Magistrate to exercise her discretion judiciously by rejecting it immediately. (para 20)

(8) As for the charge, this court found it contained two distinct offences and was a duplicity of the offence. The accuseds could not plead guilty to a charge which was confusing and did not contain the correct ingredients of the offence intended by the prosecution and framed against the accuseds. In the instant case, the charge was a mixture of two offences (1) possession of false National Registration Identity Card and (2) using the false National Registration Identity Card. In order to constitute an offence of being in possession of false National Registration Identity Card it did not require a further ingredient of making use of the false National Registration Identity Card as it contained two distinct and separate offences where each could stand on its own to disclose a particular offence. Accordingly, to include the word 'made use' in the charge for possession of false National Registration Identity Card was unnecessary, confusing and embarrassing. (para 25)

(9) The charge stated that the accuseds were in possession and made use of false identity card which in the view of this court was defective. It could not be said that the accuseds were not misled by such error as the offence of making use of an identity card applied to a forged identity card and not to a false identity card. The wording ' was in possession' and 'made use' were two distinct offences and could not be lumped up in one charge to read possession and made use of the identity card which was false. The wording of the charge was misleading and contrary to the requirement of the ingredients as required by s. 25(1)(e) of the National Registration Regulations 1990. The accuseds have been prejudiced, misled and it could not be disputed that this had occasioned a miscarriage of justice. (para 25)

(10) The accuseds were found guilty and convicted not on one of the two distinct offences but rather on the defective charge as framed. This finding of this court was clear from the decision of the Magistrate in which she said ' Terima akuan salah OKT' 'Salah dan sabit atas pertuduhan' and it does not state which accused or whether it referred to all the four accuseds as only the National Registration Identity Card of the first accused was tendered in court. The accuseds should know which of the two distinct offences was intended to be proved against them. In the criminal justice system in this jurisdiction, it was not simply whether

the accused was guilty or not guilty, but whether prosecution had framed a correct charge and the accused must be properly and distinctly charged. (para 39)

(11) The two distinct offences were not necessarily committed by one and the same act; in other words, the act done may constitute one of the offences but may not constitute the other. An offender who was in possession of false National Registration Identity Card may not necessarily use it unless there was a statutory presumption. That being so, it was obvious that the charge contemplated two distinct offences and was therefore bad for duplicity and could not properly be convicted on the defective charge. Section 163 of the Criminal Procedure Code provides that every distinct offence where a person is accused shall be framed separately and there shall be a separate charge. Joinder of two distinct offences in one charge though may arise out of the same transaction and in disobedience to an express provision in the Criminal Procedure Code could not be said that it had not caused confusion or that failure of justice had not occasioned. (para 40)

(12) The accuseds had pleaded guilty without understanding the nature of the charge or whether they had intended to admit that they were guilty to a charge which was defective and misleading. The Magistrate did not keep clear in her mind that there were two distinct and separate offences contained in the charge and she had not considered them separately. Accordingly, the Magistrate should have disregarded the allegation that the accuseds had made use of the National Registration Identity Card as it was a separate offence for which there were no facts to support it. Therefore, it could not be said that the duplicity was merely an irregularity which could be cured under the provisions of s. 422 of the Criminal Procedure Code and that the accuseds were not prejudiced. It was impossible to say that failure of justice had not occasioned by the duplicity. (para 42)

(13) It was unsafe and unsatisfactory to allow the plea of guilty to be sustained. If the plea of guilty was allowed to remain, there was likely to be some lurking doubt whether the entire procedure of taking the plea of the accuseds were correct and whether the accuseds understood the charge, the nature and consequences of the plea and consequently whether the

policeman who acted as interpreter and the accuseds understood each other. This court was very much in doubt whether the accuseds understood to what offence they had pleaded guilty. Therefore, this court found that the conviction constituted a miscarriage of justice. (para 49)

(14) There were too many unsatisfactory features to order a retrial which would be most unfair to the accuseds. First, the charge itself did not disclose the correct ingredients and contained two distinct offences. Secondly, the accuseds had already been under remand from 22 September 2005 and had served the sentence for a period of three weeks. Thirdly, the charge was defective and fourthly there were no facts to support the charge. Fifthly, it was not in the interest of justice to order a retrial. (para 50

[Sentence set aside and fines, if paid, ordered to be refunded to the accuseds; no order for retrial.]

Case(s) referred to:

Abdul Kadir Abdul Rahman v. PP [1984] 1 MLJ 80 ***(refd)***
Abdul Salam v. PP [1955] 21 MLJ 116 ***(refd)***
Ah Soi v. King-Emperor AIR [1926] Calcutta 922 ***(foll)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 ***(foll)***
Ang Leong v. PP [1985] 1 MLJ 239 ***(refd)***
Awaluddin Suratman & Ors v. PP [1991] 1 CLJ 2459; [1991] 2 CLJ (Rep) 310 HC ***(refd)***
Billinghurst & Ors v. King Emperor AIR [1924] Cal 18 ***(refd)***
Chadderton [1980] 2 Cr App R (S) 272 ***(refd)***
Chan Chong v. PP [1957] 23 MLJ 246 ***(refd)***
Chee Chiew Heong v. PP [1981] 2 MLJ 287 ***(foll)***
Cheng Seng Heng & Ors v. PP [1949] MLJ 175 ***(foll)***
Cheong See Leong v. PP [1949] 15 MLJ 67 ***(foll)***
Chin Ban Keat v. Rex [1949] 15 MLJ 297 ***(refd)***
Chittaranjan Das v. The State Of West Bengal AIR [1963] SC 1696 ***(refd)***
Chong Chee Pak v. PP [1948-49] MLJ Supp 45 ***(refd)***
Cotterill v. Lempriere [1890] QBD Vol. XXIV 634 ***(refd)***
Emperor v. Nasrullah & Ors [1928] Air 289 ***(refd)***
Esa & Ors v. PP [1962] 28 MLJ 341 ***(refd)***
Fong Hong Sium v. PP [1950] 16 MLJ 293 ***(foll)***
General Medical Council v. Spackman [1943] AC 627 ***(refd)***
Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(foll)***
Habeeb Najar Abdul Rashid lwn. Penguasa Komandan, Pusat Serenti Bukit Mertajam Vide High Court, Pulau Pinang Criminal Application No 44-12-49 (Unreported) ***(refd)***
Hashim Mat Isa v. PP [1950] 16 MLJ 94 ***(refd)***

Hasibullah Mohd Ghazali v. PP [1993] 4 CLJ 535 SC ***(foll)***
Heng Kim Khoon v. PP [1972] 1 MLJ 30 ***(refd)***
Huang Chin Shiu v. Rex [1952] 18 MLJ 7 ***(foll)***
Huchison [1972] (56) Cr. App R 307 ***(refd)***
Jagar Singh v. PP [1936] MLJ Rep 92 ***(foll)***
K Nalliah v. Rex [1948] 14 MLJ 185 ***(foll)***
Khor Ah Kah v. PP [1964] 30 MLJ 309 ***(refd)***
Kiew Foo Mui & Ors v. PP [1996] 1 CLJ 14 ***(foll)***
Koh Mui Keow v. Regina [1952] 18 MLJ 214 ***(refd)***
Lau Eng Teck v. PP [1965] 31 MLJ 34 ***(refd)***
Lee Weng Tuck & Anor v. PP [1989] 2 MLJ 143 ***(refd)***
Lester [1976] Crim. LR 389 ***(refd)***
Lew Cheok Hin v. Reg [1956] 22 MLJ 131 ***(refd)***
Lo Kim Peng & Ors v. PP [1971] 1 MLJ 249 ***(refd)***
Lian Kian Boon v. PP [1997] 1 MLJ 51 ***(refd)***
Liaw Kwai Fah & Anor v. PP [1987] 2 MLJ 69 ***(refd)***
Lobban v. The Queen [1995] 1 WLR 877 ***(foll)***
Low Hiong Boon v. PP [1948-49] MLJ Supp 135 ***(refd)***
Low Seng Wah v. PP [1962] 28 MLJ 107 ***(refd)***
Mahmood Ali v. PP [1964] 30 MLJ 57 ***(refd)***
Manokaran & Anor v. PP [1979] 1 MLJ 262 ***(refd)***
Mat Repin Mamat v. PP [1994] 1 SLR 663 ***(refd)***
Mee Lian Co v. PP [1962] 28 MLJ 131 ***(refd)***
Meissner v. The Queen [1995] 184 CLR 132 ***(refd)***
Mohammad Hassan v. PP [1997] 1 CLJ Supp 485 HC ***(refd)***
Mohd Dalhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur [1995] 2 CLJ 209 CA ***(refd)***
Munandu v. PP [1984] 2 MLJ 82 ***(foll)***
Municipal Commissoners v. Chuah Seng & Ors [1882] 2 Ky 140 ***(refd)***
Palan v. PP [1932] MLJ 124 ***(refd)***
Pek Tin Shu & Anor v. PP [1948] 14 MLJ 110 ***(refd)***
PP v. Anthony [1972] 1 MLJ 229 ***(refd)***
PP v. Cheah Chooi Chuan [1972] 1 MLJ 215 ***(foll)***
PP v. Chean Tin [1939] 8 MLJ FMSR 266 ***(refd)***
PP v. Datuk Hj Harun Hj Idris [1977] 1 MLJ 14 ***(foll)***
PP v. H Chamras Tasaso [1975] 2 MLJ 44 ***(foll)***
PP v. Lim Chai Seng & Ors [1956] 22 MLJ 236 ***(refd)***
PP v. LKI Holidays Leisure Sdn Bhd [1998] 1 MLJ 315 ***(foll)***
PP v. Low Ah Sang [1962] 28 MLJ 13 ***(refd)***
PP v. Mohamed Tarmizi [1985] 1 MLJ 219 ***(foll)***
PP v. Muhari Mohd Jani & Anor [1999] 8 CLJ 430 HC ***(foll)***
PP v. Nahat Singh [1939] 8 MLJ FMSR 239 ***(refd)***
PP v. Paghutheen [1969] 1 MLJ 25 ***(refd)***
PP v. Soon Tiew Choon [1976] 1 MLJ 189 ***(refd)***
PP v. Syed Bakri [1932] MLJ XVII Vol XXI No. 6 ***(refd)***
PP v. Tanggaah [1972] 1 MLJ 207 ***(refd)***
PP v. Tengku Hitam [1962] 28 MLJ 414 ***(refd)***
R v. Fisher [1982] Crim LR 191 ***(refd)***

R v. Foo [1976] Crim LR 456 ***(refd)***
R v. Sussex Justices [1924] 1 KB 256 ***(foll)***
R v. Wells, Ex Parte Clifford [1904] 91 LT 98 ***(refd)***
R v. Wilmot [1933] All ER Rep 628 ***(refd)***
Ragzan Chhodop v. Emperor Air (35) [1948] Lahore 97 ***(refd)***
Ramanathan Chettiar v. Subrahmanya Ayyar Ilr 47 Mad 722 ***(refd)***
Rex v. Edwards [1913] 1 KB 287 ***(refd)***
Rex v. Forde [1923] 2 KB 400 ***(refd)***
Rex v. Johnson [1945] KB 424 ***(refd)***
Rex v. Lim Soon Gong & Ors [1939] 8 MLJ SSR 10 ***(refd)***
Rex v. Molloy [1921] 2 KB 364 ***(refd)***
Robinson [1969] (53) Cr. App R 314 ***(refd)***
S Govindasamy v. PP [1949] 15 MLJ 101 ***(refd)***
See Yew Poo v. PP [1949] 15 MLJ 131 ***(foll)***
Sebastian v. PP [1968] 2 MLJ 214 ***(refd)***
Shangara Singh v. PP [1967] 1 MLJ 15 ***(foll)***
Sim Boon Chai v. PP [1982] 1 MLJ 353 ***(refd)***
Simon Chua Kim Hock v. PP [1994] 4 CLJ 218 HC ***(refd)***
Subramaniam & Anor v. PP [1976] 1 MLJ 76 ***(refd)***
Tan Chin Keng v. PP [1964] 30 MLJ 316 ***(refd)***
Tang Hee Hing v. PP [1991] 1 MLJ 402 ***(foll)***
Tang Kee Chie v. PP [1987] 1 MLJ 430 ***(refd)***
Teo Peng Chow & Ors v. PP [1957] 23 MLJ 118 ***(refd)***
The King v. Edwards & Anor [1913] 1 KB 287 ***(refd)***
The King v. Jones & Ors, Justices Ex Parte Thomas [1921] 1 KB 632 ***(refd)***
The King v. Surrey Justices, Ex Parte Witherick [1932] 1 KB 450 ***(refd)***
Thomson v. Knights [1947] 1 KB 336 ***(refd)***
Tukiran Taib v. PP [1955] 21 MLJ 24 ***(foll)***
Van Vierinten v. PP [1966] 1 MLJ 122 ***(refd)***
Veen v. The Queen (No. 2) [1988] 164 CLR 465 ***(refd)***
Vellu Thevar v. R AIR [1932] Rang 90 ***(refd)***
Wee Hui Hoo v. PP [1987] 1 MLJ 498 ***(refd)***
Wong Kok Keong v. Regina [1955] 21 MLJ 13 ***(foll)***
Wong Siak Fon v. PP [1972] 1 MLJ 203 ***(refd)***
Yap Liow Swee v. PP [1937] 6 MLJ (FMSR) 225 ***(refd)***
Yeo Sim Huat & Ors v. PP [1961] 27 MLJ 328 ***(foll)***
Yoh Meng Heng v. PP [1970] 1 MLJ 14 ***(refd)***
Zahari Yeop Baai & Anor v. PP [1980] 1 MLJ 160 ***(foll)***
Zulkiflee Mohd Dom v. PP [1997] 3 CLJ Supp 290 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 255, 270(2), 422
National Registration Regulations 1990, s. 25(1)(e)

For the applicants - Ranjit Singh Sandu; M/s Ranjit Singh Sandu
For the respondent - Abdul Rahman Putra DPP

Reported by Suhainah Wahiduddin

JUDGMENT

VT Singham J:

[1] In this case, the four applicants (hereinafter will be referred to as the accuseds) who are of Thai origin were charged on 30 September 2005 at the Magistrate's Court, Ipoh as follows:

Charge (Arrest Case No: 83-1785-2005)

(Public Prosecutor v. Ah Poon) (age 22 years)

Bahawa kamu pada 22.9.2005 jam lebih kurang 8.50 malam bertempat di Rumah Urut Taiwan, No. 82-A, Jalan Kampar, Ipoh di dalam Daerah Kinta, di dalam Negeri Perak, telah didapati kamu memiliki dan menggunakan Kad Pengenalan atas nama: Tan Li Li, No. KPT: 810611-09-5662 yang disahkan palsu. Oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 25(1)(e) Peraturan Pendaftaran Negara 1990.

Charge (Arrest Case No: 83-1786-2005)

(Public Prosecutor v. Ah Hai) (age 24 years)

Bahawa kamu pada 22.9.2005 jam lebih kurang 8.50 malam bertempat di Rumah Urut Taiwan, No. 82-A, Jalan Kampar, Ipoh di dalam Daerah Kinta, di dalam Negeri Perak, telah didapati kamu memiliki dan menggunakan Kad Pengenalan atas nama: Lee Kim Eng, No. KPT: 810314-09-5068 yang disahkan palsu. Oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 25(1)(e) Peraturan Pendaftaran Negara 1990.

Charge (Arrest Case No: 83-1787 – 2005)

(Public Prosecutor v. Ah Tan) (age 19 years)

Bahawa kamu pada 22.9.2005 jam lebih kurang 8.50 malam bertempat di Rumah Urut Taiwan, No. 82-A, Jalan Kampar, Ipoh di dalam Daerah Kinta, di dalam Negeri Perak, telah didapati kamu memiliki dan menggunakan Kad Pengenalan atas nama: Kok Yoon Mooi, No. KPT: 821017-09-5002 yang disahkan palsu. Oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 25(1)(e) Peraturan Pendaftaran Negara 1990.

Charge (Arrest Case No: 83-1788-2005)

(Public Prosecutor v. Ah Fai) (age 21 years)

A Bahawa kamu pada 22.9.2005 jam lebih kurang 8.50 malam bertempat di Rumah Urut Taiwan, No. 82-A, Jalan Kampar, Ipoh di dalam Daerah Kinta, di dalam Negeri Perak, telah didapati kamu memiliki dan menggunakan Kad Pengenalan atas nama: Chai Choh Fah, No. KPT: 820815-09-5068 yang disahkan palsu. Oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh
B dihukum di bawah Seksyen 25(1)(e) Peraturan Pendaftaran Negara 1990.

[2] According to the notes of proceedings at the Magistrate's Court, Ipoh which was received by this court, all the four
C accuseds seemed to have pleaded guilty to the charge on 30 September 2005 which was read, purported to have been explained and understood and supposedly to be in Thai language. Facts of the case have been recorded by the learned Magistrate as per the charge. It is also stated in the notes that the following
D exhibits were admitted as correct but it does not state who had admitted the exhibits as there were four accused persons and the notes of proceedings shows the names of the four accused persons as having been included in one set of the notes of proceedings:

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(1) National Registration Identity Card with the name Tan Li Li 810611-09-5662 (not marked as exhibit);

(2) a letter from the Immigration Department which confirms that there is no travel document in the name of the accused – Ah
F Poon and marked as exh. P2;

(3) Pekan Baru report 5139/05 marked as exh. P3;

(4) confirmation from the National Registration Department that the number of the National Registration Identity Card as
G stated in the separate charge against the four accuseds does not exist and the use of the National Registration Identity Card with such numbers is not valid marked as exh. P4.

H **[3]** The learned Magistrate accepted the plea of guilty, found them guilty and convicted them on 30 September 2005 of the offence as charged. All the four accuseds were sentenced to five (5) months' imprisonment with effect from the date of arrest on 22 September 2005 and fined a sum of RM3,000 in default 3 months imprisonment. It is important to state at this stage that
I although the four accused persons were alleged to be in possession of a National Registration Identity Card individually as

stated in the four separate charges, the notes of proceedings sent to this court contains evidence as to only one National Registration Identity Card with the name Tan Li Li 810611-09-5662 which was not marked as an exhibit.

[4] However, by a letter dated 3 October 2005 Tetuan Ranjit Singh Sandhu, Advocates & Solicitors practicing in Ipoh, complained to this court that:

(1) the accuseds who were unrepresented by counsel at the Magistrate's Court did not understand the language of the court proceedings;

(2) a policeman was called to act as an interpreter for the four accuseds;

(3) the nature and consequences of the plea and the sentence provided by law was not explained to the accuseds;

(4) learned counsel applied to this court to call for the record of proceedings from the Magistrate's Court for this court to be satisfied as to whether the decision of the learned Magistrate was correct and to exercise its revisionary powers with a view to revise the decision if there were errors or flaws in the proceedings.

[5] This court then called for the record of proceedings from the Magistrate's Court with a view to consider the complaint and the correctness of the procedure and its decision. Upon having received and perused the notes of proceedings and the record from the Magistrate's Court, Ipoh, this court found that there was basis for the complaint and fixed an early date for revision as the accuseds were serving sentence. By letter dated 6 October 2005 this court then requested both the learned counsel and the Deputy Public Prosecutor to attend court on 13 October 2005 with the view to address and assist this court on the complaints raised by the learned counsel. Infact, all the four accuseds have been in remand from the date of arrest on 22 September 2005 and were serving sentence which was ordered to take effect from the date of arrest on 22 September 2005.

[6] On 13 October 2005, when the revision proceedings were called up, this court invited both the learned counsel and the Deputy Public Prosecutor to address the court. The four accuseds were also present in court having been brought to this court by the Prison authorities from Tapah.

[7] Learned counsel for the accuseds submitted as follows:

(1) the accuseds were not provided with a certified Thai Interpreter and instead a policeman was instructed by the Magistrate to act as an Interpreter;

(2) the accuseds did not understand the Interpreter and therefore they did not understand the charge when it was read to them;

(3) the nature and consequences of the plea was not explained to the accuseds and neither were they informed of the sentence provided by law;

(4) the accuseds were not informed that they have the right to engage a counsel of their choice. The accuseds being foreigners should have been informed of their right to have a counsel and the nature and consequences of their plea should have been explained to them;

(5) there were no facts presented by the prosecution to support the charge;

(6) he urged upon this court to quash the conviction and set aside the sentence;

(7) the accuseds have been in remand from the date of arrest on 22 September 2005 and are serving sentence to date (have already undergone about three weeks imprisonment).

[8] Learned Deputy Public Prosecutor submitted as follows:

(1) conceded that the interpreter was a policeman and he is not aware whether the policeman is a qualified interpreter to interpret from Thai to Bahasa Malaysia and from Bahasa Malaysia to Thai. He further conceded that it was not proper to instruct a policeman to interpret the proceedings to the accuseds and the learned Magistrate should have arranged for a proper certified Thai Interpreter;

(2) conceded that there is nothing in the record to show whether the nature and consequences of the plea of guilty was explained to the accuseds;

(3) conceded that there were no facts to support the charge;

(4) however, he urged upon this court to order a retrial and remit the case back to the Magistrate's Court.

Decision Of This Court

[9] On going through the typed record of proceedings from the lower court which are certified as true copy, this court found the following errors and blunders:

(1) the date of the conviction and sentence has been recorded as 20 September 2005 instead of 30 September 2005;

(2) the record states that the Interpreter had translated all the proceedings from Bahasa Thai to Bahasa Malaysia but does not state whether it has been translated from Bahasa Malaysia to Bahasa Thai;

(3) admittedly, it is not stated in the record whether the nature and consequences of the plea of guilty was explained to the accuseds, and that they understood;

(4) there is nothing in the record to show that the letter from the Immigration department (exh. P2), the police report No: 5139/05 (exh. P3) and the confirmation from the National Registration Department (exh. P4) were read and explained to the accuseds except for the bare and standard mechanical phrase 'Barang kes diakui benar'. It is not stated to whom were the exhibits shown and explained as there were four accused persons;

(5) there is no record to show if there was any mitigating factors put forward by the accuseds who were unrepresented as to how they came into possession and use of the National Registration Identity Card (NRIC) belonging to others as per the charge and the only National Registration Identity Card produced in court which was alleged to be false and which was in the possession of the accused person was not even marked as an exhibit. Furthermore, facts as per the charge as informed by the prosecuting officer was also not supported with evidence as according to the typed notes of proceedings, there was only one National Registration Identity Card with the name Tan Li Li tendered but not marked as an exhibit. Accordingly, the four accuseds could not have used the National Registration Identity Card as per the charge. At this stage, it is important to state that the name Lee Kim Eng and the National Registration Identity Card No: 810314-09-5068 which has been typed in bold in the charge against the

A accused Ah Poon, has been deleted and handwritten as Tan Li Li and the National Registration Identity Card as No: 810611-09-5662. There is no record or initial to show who deleted the name Lee Kim Eng and the National Registration Identity Card No: 810314-09-5068 in the charge and wrote
B Tan Li Li and National Registration Identity Card as No: 810611-09-5662 and when this deletion was done;

(6) the National Registration Identity Card with the name Tan Li Li bearing No: 810611-09-5662 which was tendered in court
C but was not marked as an exhibit;

(7) the charge framed contains two distinct alleged offences, namely, the accused was found to be in possession and made use of identity card which was certified as false but they are distinct and separate offence as already spelt out in s. 25(1)(e)
D of the National Registration Regulations 1990 and there ought to have been two separate charges.

(8) the letter dated 26 September 2005 from the Immigration department which has been marked as exh. P2 which was
E referred only to the first accused did not confirm that there was no travel document in the name of the first accused or the other three accuseds except that it states there was no record of the entry and exit of the first accused as she did not have a passport;

F

(9) the contents of the police report Pekan Baru report No: 5139/05 marked as exh. P3 by the raiding officer was not read and explained to the accuseds which includes the allegation that they were suspected to be carrying out prostitution activities
G and that they were also in possession of false identity cards;

(10) there was no record of any evidence of antecedents and character of the accuseds having been obtained from them before sentence was passed except for a bare statement under 'rayuan' which states that the accuseds intend to return soon
H to their country of origin.

I

Interpreter

[10] It cannot be denied that it was an irregular and improper exercise for the learned Magistrate to have directed a policeman who is not a certified interpreter to interpret the charge to the accuseds of Thai origin and such a practice is not only unsatisfactory but most undesirable and cannot be condoned.

first, the accuseds must understand the interpreter and *vice versa* and the Magistrate ought to have ascertained this facts from the accuseds through the interpreter;

secondly, whenever a charge is framed in the language not understood by the accused and he or she is present in person, it shall be interpreted and explained to him or her in the language which he or she understands;

In *K. Nalliah v. Rex* [1948] 14 MLJ 185, Murray-Aynsley CJ said:

> Necessity of having proper Interpreters for the accused.
>
> In this case the accused was Tamil speaking. There was no Tamil interpreter available at the trial and so the evidence was translated into Malay and the accused gave his evidence in Malay.
>
> Held, that this was a wrong procedure and that there must be a re-trial.

In *Fong Hong Sium v. Public Prosecutor* [1950] 16 MLJ 293, Briggs J said:

> … It is a general rule of practice that, unless the interpreter is officially qualified in the language, the Court should ascertain that he can understand, and be understood by the accused with sufficient ease to enable the proceedings to be properly conducted. The most convenient method is to allow him to talk for a few moments with the accused and to enquire whether they can so understand one another. When the Court is satisfied of this, it should be incorporated in the record before the evidence is recorded. There are, of course, cases when this would be quite unnecessary, for example, if both the accused and interpreter are Siamese and are speaking Siamese and the interpreter is fluent in English. When, either by reason of the interpreter being officially qualified or in such manner

A as is described above, it is established that the interpreter is competent to do his work as such, he must then, unless exempted under the provisions of section 4(2) of the Ordinance, be sworn, and an omission to do this is an illegality. As the interpreter in this case was not an official B Court interpreter, or a certified interpreter in the employment of Government, the omission to swear him was an incurable defect, and it was on this ground that I was obliged to allow the appeal and set aside the conviction and sentence. If the interpreter had sworn to his ability to understand and be understood by the appellant, and had C been duly sworn as Interpreter, the appellant would have found it very difficult to persuade me that he was not adequately interpreted.

In *Munandu v. Public Prosecutor* [1984] 2 MLJ 82 at p. 83, His Lordship Gunn Chit Tuan J (as he then was) said:

D

I agreed with the contention of counsel that where an accused is unrepresented every ingredient and question of the charge should be explained to the accused by the Magistrate and his replies recorded, and that no plea of guilty should be recorded if there is doubt that the plea is E a qualified plea of guilty. (See *Yeo Sim Huat v. Public Prosecutor*). In this case it was clear that the accused's plea did not constitute an unequivocal plea of guilty and his plea should not have been accepted (*Lau Eng Teck v. Public Prosecutor*). I was satisfied after examining the record of F proceeding in this case that the accused did not fully understand the charges or knew that if he really in good faith and believing the bicycle to be his own property had taken it out of the owner's possession, then he did not take it dishonestly, and therefore did not commit theft. *(Rex v. Lim Soon Gong & Ors)*.

G

In *Huang Chin Shiu v. Rex* [1952] 18 MLJ 7 at p. 8, Spenser Wilkinson J (as he then was) said:

H In view of this evidence I came to the conclusion that the plea of guilty could not stand. It is to my mind essential to the validity of a plea of guilty that the accused should fully understand what he is pleading to; and it is impossible to be sure that he has understood, unless the charge has been explained to him in a language with which he is I entirely conversant. Legal phraseology is apt to be confusing to a layman, even in his own native language, and nobody can be expected to understand all the implications of a criminal charge, if it is read out to him in what is to him a foreign language.

In a large number of cases in the Magistrates' Courts in this country the accused speaks a language not understood by the Magistrate, so that what transpires between the accused and the interpreter is unknown to the Court. It is, therefore, the duty of the interpreter not only to make sure that he and the accused understand one another but it is also his duty to inform the Court, if there is any difference of language which might cause any difficulty. If the interpreter present cannot converse freely with the accused in the language of his choice the Court must be informed so that a suitable interpreter can be found, however inconvenient this may be to the Court, to the parties or to the witnesses.

Magistrates also have a duty in this matter. In the example given in the above quoted extract from the judgment in *Fong Hong Sium v. Public Prosecutor* there would be no difficulty; but if in that example the word "Chinese" is substituted for the word "Siamese" the situation is entirely different. As is well known it is not enough that for a Chinese accused there should be a Chinese interpreter – there must be a Chinese interpreter who is competent to interpret in the accused's particular dialect. And just because the accused and the interpreter are both Chinese any difficulty which may arise will not be apparent to the Magistrate; which is what happened in the case now before me. Magistrates must, therefore, ensure as a matter of routine in their Courts, that interpreters ascertain the language or dialect of the accused in all cases and inform the Court of any difficulty there may be. One method of doing this (though I do not lay this down as the best or only method) is to make a practice of writing after the name of the accused in notebook his own dialect and the dialect which is being used.

I have already in a recent judgment drawn attention to the importance of an accused who pleads guilty receiving the same consideration before sentence as one who has claimed trial, and need not repeat my remarks here. Nor do I need to stress the importance of making sure that a plea of guilty is fully intended, because I am certain that Magistrates are fully alive to the importance of this. I cannot, however, over-emphasise the great importance of making sure of always using an interpreter who is fluent in both the accused's own language and the language of the Court.

In *Mat Repin bin Mamat v. Public Prosecutor* [1994] 1 SLR 663 at p. 666, His Lordship Karthigesu JA in delivering the judgment of the Court of Appeal in Singapore said:

> On the question of interpreters, the relevant provision is to be found in s. 209(1) of the Criminal Procedure Code (Cap 68) ('CPC') which reads as follows:
>
> > Whenever any evidence is given in a language not understood by the accused and he is present in person, it shall be interpreted to him forthwith in a language which he understands.
>
> Section 209 and other provisions in the CPC as to interpreters are statutory safeguards to ensure that an accused is substantially able to comprehend the proceedings to enable him to best present his defence. The ability to understand the prosecution case against him will allow him to decide whether to give evidence himself, whether to call witnesses on his behalf or whether to instruct his counsel to rebut any particular piece of evidence given by the prosecution.
>
> It is therefore the court's duty to ensure that the accused is able to substantially understand the evidence given in the proceedings. The right to an interpreter cannot be waived by an accused or his counsel and this was stated succinctly by the Lord Chief Justice of England in *R v. Lee Kun* at p 299:
>
> > If (the accused) does not understand the English language, he cannot waive compliance with the rule that evidence must be translated; he cannot dispense with it by express or implied consent, and it matters not that no application is made by him for the assistance of an interpreter. It is for the court to see that the necessary means are adopted to convey the evidence to his intelligence, notwithstanding that, either through ignorance or timidity or disregard of his own interests, he makes no application to the court. The reason is that the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. (emphasis added.)

In *Ragzan Chhodop v. Emperor* AIR (35) 1948 Lahore 97, Teja Singh J said:

> When an accused person does not understand the language of the Court, the services of an interpreter should be placed at his disposal so that he may know what the witnesses state and be in a position to suggest questions for cross-examination. By the very nature of things, the interpreter must be a person other than the witness whose evidence is to be interpreted, otherwise, the procedure of appointing an interpreter would be nothing but a farce. To allow a witness to interpret his own evidence is to place the accused entirely at his mercy, because in such case there can possibly be no guarantee that he would faithfully tell the accused what he would state before the Court and if the accused put any questions to him by way of cross-examination he would reproduce them faithfully in the Court language.

It is therefore mandatory and the duty of the court to ensure that the charge is interpreted to the accused in the language which he or she understands if it is not framed in the language he or she understands;

thirdly, the plea must be completely unequivocal, unreserved and unqualified. (See *Public Prosecutor v. Cheah Chooi Chuan* [1972] 1 MLJ 215, *Lee Weng Tuck & Anor v. Public Prosecutor* [1989] 2 MLJ 143 at p. 146). The notes of proceedings does not show that the learned Magistrate had explained the nature and consequences of their plea in respect of the charge when they pleaded guilty and that they had intended to admit without qualification of the offence alleged against them. (see *Mahmood Ali v. Public Prosecutor* [1964] 30 MLJ 57). The learned Magistrate should have been satisfied with this requirement that the plea was unequivocal, unreserved and unqualified before accepting the plea of guilty;

fourthly, the nature and consequences of the plea and the punishment provided by law must be explained and in the language which the accuseds understand and must be understood by the accuseds especially in the instant case, the accuseds being foreigners;

fifthly, there may have been some strong mitigating factors which the accuseds wished to explain to the court the circumstances and how they came to be in possession of the National Registration Identity Card as stated in the charge and which was tendered only in respect of the first accused and not even marked as an exhibit and the National Registration Identity Card of the three other accuseds were

not even tendered or marked as an exhibit and all these information is not recorded in the typed and certified true copy of the notes of proceedings received by this court. The accuseds were not given an opportunity to explain or state if there were any extenuating circumstances under which the offence was alleged to have been committed and the position in which they were placed at the place of incident when they were arrested by the police. Accordingly, it was the duty of the Magistrate to have ascertained from the accuseds who were unrepresented by counsel, evidence of antecedents, the background of the case and character of the accuseds before proceeding to mete out the punishment. (See *Tukiran bin Taib v. Public Prosecutor* [1955] 21 MLJ 24 at p. 25, *Sim Boon Chai v. Public Prosecutor* [1982] 1 MLJ 353 at p. 354);

seventhly, the learned Magistrate has a duty to inquire whether the accuseds wished to engage a counsel bearing in mind that they were foreigners and especially where they may not be able to know the legal procedure in this jurisdiction. Section 255 of the Criminal Procedure Code states: "Subject to any express provision of law to the contrary, every person accused before any court may of right be defended by an advocate". Basically this section entrenches the constitutional guarantees and that an accused has a right to be defended by a lawyer. (See *Emperor v. Nasrullah & Ors* [1928] AIR 289, *Ramanathan Chettiar v. Subrahmanya Ayyar* ILR 47 Mad 722, *Van Vierinten v. Public Prosecutor* [1966] 1 MLJ 122 at p. 123, *Liaw Kwai Fah & Anor v. Public Prosecutor* [1987] 2 MLJ 69).

[11] There is nothing in the record to show that the accuseds were asked whether they understood the policeman who acted as an interpreter bearing in mind the provision for certified interpreter is a right which is given to them under the law and there should be no departure from this settled practice and law and no one can take that right away. To deprive the accuseds of a certified Thai interpreter who is able to interpret the plea taken from the accuseds and the mitigation plea for the consideration of the court is a serious matter and cannot be taken lightly. Infact it constitutes a breach of a substantive right which forms part and parcel of the doctrine of procedural fairness. In *Manokaran & Anor v. Public Prosecutor* [1979] 1 MLJ 262 at p. 263, His Lordship Abdoolcader J (as His Lordship then was) said:

It is a matter of the gravest public policy that the impartiality of the courts of justice should not be doubted or that the fairness of a trial should be questioned; otherwise, the only bulwark of the liberty of the subject would be undermined.

[12] In cases where a police officer is called or invited to act as an interpreter, it is desirable for the learned magistrate to satisfy herself that the police officer is not conversant or familiar with the material facts of the case or had taken a role in any manner or in any part of the investigation before he is ordered to take the oath of an interpreter under Oaths and Affirmations Act 1949. Unfortunately, this exercise was not carried out by the learned Magistrate. In *Cheong See Leong v. Public Prosecutor* [1949] 15 MLJ 67, Spenser-Wilkinson J said "(1) that although the statement was made through an interpreter, it was a statement made by the appellant to a Police Inspector and so came within the provisions of reg. 33 of the Emergency Regulations; (2) that the principle that a judicial officer who is interested in a case should not sit to adjudicate upon it, applies in regard to interpreters;" (See *Cheng Seng Heng & 4 Others v. Public Prosecutor* [1949] MLJ 175 and *Ah Soi v. King-Emperor* AIR [1926] Calcutta 922)

[13] In the circumstances, the learned Magistrate ought to have postponed the case when there was no certified Thai Interpreter on that date even if there was possible considerable administrative inconvenience being caused if the case was postponed to call for a certified Thai Interpreter instead of having made use of a policeman who may possibly have an interest in the outcome of the case. It is the respectful view of this court that mere administrative difficulties to obtain the services of a certified interpreter are not in the court's view enough to proceed with the case in such a hurried fashion without calling for a certified Thai Interpreter which was apparent to the court that it was essential to the course of justice and to give an opportunity to the accuseds to communicate their plea and grievances to the court in the language or dialect which they are able to communicate. It has been said convenience and justice are often not on speaking terms (per Lord Atkin *General Medical Council v. Spackman* [1943] AC 627 at p. 638), (See *Low Hiong Boon (f) v. Public Prosecutor* [1948-49] MLJ Supp 135, *Koh Mui Keow v. Regina* [1952] 18 MLJ 214, *Lo Kim Peng & Ors v. Public Prosecutor* [1971] 1 MLJ 249). In *Simon Chua Kim Hock v. Public Prosecutor* [1994] 4 CLJ 218, His Lordship Ian HC Chin J observed that "The law demands, though not hurried, but, a speedy trial".

[14] Administrative inconvenience or difficulties to obtain the services of a qualified and certified Thai Interpreter should not be a ground to disregard the requirement of justice to provide the accused persons with a qualified and certified interpreter of a dialect which he or she is able to communicate with the accuseds before recording the plea of the accused. Judicial proceedings should not be hurried in such a fashion or the requirement of essential justice relaxed as in the instant case for the sake of expediency and completing a case and merely for the sake to meet the requirement of statistics or the number of cases disposed off for the day. The speed in which the case was disposed off and disregarding established and statutory procedural requirement in the taking of plea and accepting the plea of guilty can never be a consideration in the discharge of judicial function and in the administration of justice. In this respect, it is important to stress and be reminded as has been said time and time again that justice should not be sacrificed at the altar of statistics. In *Public Prosecutor v. H. Chamras Tasaso* [1975] 2 MLJ 44, Hashim Yeop A. Sani J (as he then was) said:

> At the outset let me say this. *I would rather live with arrears and backlog of cases, which is I think a lesser evil, than have cases disposed off with such a speed and in such hurried a fashion as would leave in the minds of the ordinary persons a lingering suspicion that something is not right.* Justice must not only be done but must manifestly be seen to be done. This case which I have called for revision is a case in point. (emphasis added)

> Our system of justice has its own traditions. These traditions are based on well established principles. One of these principles is that an accused person is presumed innocent until proven guilty. The right of the accused in any criminal trial will be ineffective and meaningless unless such right is supported by the spirit and the traditions on which our system is built. The importance of the presumption of innocence lies not on its abstract principle but in the extent to which in actual practice an accused person, irrespective whether he be a citizen or not, is in a position to assert that principle against an over-eager prosecutor or official who may find it easier to build up a case based on the assumption of guilt than by the laborious collection of independent evidence. The complaint of the magistrate in this case, like any other complaint by any other person, should only be a preliminary step to a proper investigation before obtaining a summons or warrant as the case may require.

> Again it is obvious from the records that the defendant is a Thai, who in his own words in his plea in mitigation, had never come to Malaysia before. Nothing is disclosed on the records that he was able to understand the language of the court. An accused person is not to be taken to admit an offence unless he pleads guilty to it in unmistakable terms with appreciation of the essential elements of the offence. (See *R. v. Golathan and R. v. Ingleson*). This rule should be more scrupulously observed in the case of an undefended accused or a person probably not versed in the language of the court as in this case. (emphasis added)

[15] The procedure as to summary trial and the recording of plea is set out in s. 173 to 177 of the Criminal Procedure Code and Magistrate should take time to comprehend the statutory requirements and to ensure that it is complied regularly and effectively. In the event the interpreter required by the accused is not available on the day, it is only desirable to adjourn the case and arrange for a qualified and certified interpreter before accepting the plea of the accuseds. (See *Public Prosecutor v. Tanggaah* [1972] 1 MLJ 207, *Awaluddin bin Suratman & Ors v. Pendakwa Raya* [1991] 3 CLJ 2459; [1991] 2 CLJ (Rep) 310). While efficient disposal of cases in the administration of justice is important and necessary but more important is the attainment of justice. It has been said justice delayed is justice denied but justice hurried is also justice denied or buried. A criminal trial does not however involve only the question of a mere allocation of court time, the accused must be afforded the opportunity of putting his tackle in order (per Abdookader J (as he then was) in a *Manokaran & Anor v. Public Prosecutor* [1979] 1 MLJ 262 at p. 263 (see also *R. v. Thames Magistrates' Court, Ex-parte Polemis* [1974] 1 WLR 1391 at p. 1375))

[16] Lackadaisical attitude by some Magistrates in discharging their judicial functions should not be allowed to continue and instead they should take upon themselves seriously of their discharge of judicial function. Magistrates should ensure that an accused person has a fair trial and the charge produced against him or her is determined fairly and justly and in accordance with settled procedures and law. It is the duty of a Magistrate to ensure that the poor, weak and those who cannot afford a counsel should not be victimised or denied justice in accordance to law and judicial proceedings should not be hurried in this mechanical fashion. It must be recognised that justice is a concept above one's personality irrespective of its status, position or origin.

A **Irrelevant And Prejudicial Facts Or Evidence**

[17] As for the police report which contains serious allegation that the accuseds are suspected to be involved in the activity of prostitution, it cannot be denied that this is highly prejudicial, B inadmissible or is otherwise objectionable and the accuseds have every right to know and understand the contents and they should be given the opportunity of raising any objection to the contents which is against them. In the instant case, there is nothing in the record to show whether the contents of the police report which C has been marked as exh. P 3 was read and explained to the accuseds and what was their response. (see *Esa & Ors v. Public Prosecutor* [1962] 28 MLJ 341 at 344).

[18] It is of paramount importance that all documentary evidence D which are tendered as evidence by the prosecution and marked as exhibits in proceedings where the accused has pleaded guilty to a charge if possible should be shown, read and explained to the accuseds and understood by him or her so that in the event the contents of the documents which contains some incriminating facts E which implicates the accuseds are disputed or not admitted, the document will have to be rejected without having it marked as an exhibit. (See s. 270(2) of the Criminal Procedure Code). Unfortunately, in some lower courts the practice has been that the documents produced by the prosecution where the accused has F pleaded guilty are straight away marked as exhibits and only thereafter it is shown to the accused in a mechanical fashion and recorded that the accused has supposedly admitted the contents when the contents were not even read or explained to the accused and understood by him or her. Be that as it may, a G document or an exhibit is not to be admitted unless it is relevant to the charge. Each case has to be dealt with on its own merits and bearing in mind the prejudicial effect on the accused and in the instant case, where the accuseds were not represented by counsel and were foreigners.

H **[19]** In the instant case, the accusation in the police report that the accuseds were involved in the activities of prostitution is highly prejudicial, improper and not relevant to the charge and ought not to have been introduced as part of the prosecution case and instead ought to have been disallowed and rejected by the learned I Magistrate. This can only happen if the Magistrate concerned takes pain and reads the police report herself before it is straight away marked as an exhibit in a mechanical fashion so that the

Magistrate could exercise her judicial discretion to reject such highly prejudicial and irrelevant materials tendered by the prosecution to support the charge where the accused has pleaded guilty. It is the respectful view of this court that it remained an automatic duty on the part of the learned Magistrate to remind the prosecution of its duty to ensure that only evidence which are admissible and relevant in law should be tendered as evidence whether by oral or documentary evidence and this is not merely of some importance but of fundamental importance to the administration of criminal justice that an accused person should feel that he has not been deprived of that priceless asset – namely a fair trial, notwithstanding the shortcomings of the prosecuting officer. It is axiomatic that a primary duty of a judge at any trial – whether criminal or civil is to ensure that justice is done, no doubt, according to law. (per Edgar Joseph Jr FCJ in *Kiew Foo Mui & Ors. v. Public Prosecutor* [1996] 1 CLJ 14, *Alcontara a/l Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705, *Hasibullah bin Mohd Ghazali v. Public Prosecutor* [1993] 4 CLJ 535, *Wong Kok Keong v. Regina* [1955] 21 MLJ 13 at p. 15, *Shangara Singh v. Public Prosecutor* [1967] 1 MLJ 15, *Lobban v. The Queen* [1995] 1 WLR 877, *Public Prosecutor v. Datuk Haji Harun bin Haji Idris* [1977] 1 MLJ 14 and *Goi Ching Ang v. Public Prosecutor* [1999] 1 CLJ 829).

[20] It is important to stress at this stage that in cases where an accused is not represented by counsel, the learned Magistrate must in addition and at all times be vigilant to ensure that highly prejudicial, inadmissible and irrelevant facts or matters are not introduced or creeped into the prosecution case and it is the duty of the Magistrate to exercise her discretion judiciously by rejecting it immediately. On the other hand, prosecuting officers should also not attempt to mislead the court by introducing irrelevant, prejudicial facts or evidence however desperate it may warrant and instead should consult the state Deputy Public Prosecutor or his officers on the evidence or facts that the prosecution propose to present, be it during a trial or at the stage of the proceedings where the accused had pleaded guilty to the charge.

[21] In *Public Prosecutor v. Muhari bin Mohd Jani & Anor* [1999] 8 CLJ 430, His Lordship KC Vohrah J (as he then was) said:

Before the statement of facts in this case as presented by the prosecutor is set out, something has to be said about the time honoured role of prosecutors which has been observed in our courts, whether they are police officers, customs officers or deputy public prosecutor – all representing the public prosecutor. As was pointed out in *R v. Roy* ILR 42 Cal 422, the purpose of a criminal trial is not to support at all costs a theory, but to investigate the offence and to determine the guilt or innocence of the accused; and the duty of the prosecuting officer is to represent not the police but the Crown; and this duty shall be discharged fairly and fearlessly and with a full sense of the responsibility attached to his position (see also the view of Judge David QC in *R v. George Maxwell (Developments) Ltd* [1980] 2 All ER 99 at p. 101).

In other words, the prosecutor must present the facts fairly in the light of admissible prosecution evidence, conceding to the defence those points of mitigation which are apparent in the prosecution evidence but equally giving weight to any aggravating factors which make the offence a serious one. I must state here that I am mindful of the powers and discretion of the Attorney General or the Public Prosecutor in relation to charges as discussed in the Supreme Court case of *Johnson Tan Han Seng v. PP* [1977] 2 MLJ 66 especially at pp 70-72, and in the Privy Council case of *Teh Cheng Poh v. PP* [1979] 1 MLJ 50 at p. 56.

I would like to reiterate that the prosecutor would have to present facts fairly in the light of admissible evidence. If he does not have admissible evidence as to what actually took place in relation to an offence, the prosecutor cannot invent theories or speculate on what took place. It is perhaps in that context that the lack of information as to what the nature of the hurt was, how the hurt was caused and what was the nature of the instrument, if any, used to cause the hurt, has to be viewed. The prosecutor would also have to state whatever aggravating factors, if any, which make the offence a serious one. It is in this context that the court below should have viewed – and it is certainly the bounden duty of this court to view – the very important last sentence of the statement of facts which the prosecutor had tendered in the court below and which both the respondents had admitted to which showed up the serious nature of the offence- that the hurt was caused over a period of 9 ½ days' interrogation:

[22] Having made the observations of the proceedings in the lower court as being irregular and improper as in the instant case, this court is mindful that undue emphasis on mere technicalities in respect of matters which are not of vital or important significance in a criminal matter, may sometime frustrate where the

contravention may not necessarily have caused prejudice to the accused or it has not necessarily vitiate the proceedings. (See *Chittaranjan Das v. The State Of West Bengal* AIR [1963] SC 1696 (V 50 C 251). However, it is also important and it is fundamental in the criminal justice system that statutory procedures, recognised practice and procedure of criminal law are not to be disregarded either due to sheer ignorance or incompetence so as to ensure that the administration of justice and impartiality are not in doubt or allowed to be brushed aside. It has been repeatedly reminded and observed the oft quoted classic words of Hewart CJ in *R v. Sussex Justices* [1924] 1 KB 256 that:

> It is not merely of some importance but of fundamental importance that justice should not only be done but should manifestly and undoubtedly have been seen to be done.

[23] The test is whether the accused has been misled or prejudiced and as a result miscarriage of justice has occasioned. (See *Billinghurst & Ors v. King Emperor* AIR [1924] Cal 18 at p. 41, *Low Seng Wah v. Public Prosecutor* [1962] 28 MLJ 107, *Meissner v. The Queen* [1995] 184 CLR 132 at p. 141, and *Zulkiflee bin Mohd Dom v. Public Prosecutor* [1997] 3 CLJ Supp 290).

[24] On the other hand, it would be a wrong precedent or for the prosecution to assume that the appellate court is obliged in every case where there is a breach of the statutory procedure or rule, to invoke the curable provision under s. 422 of the Criminal Procedure Code as each case will be decided on its own set of facts and circumstances and the nature of the breach. If the court were to entertain the application of the prosecution to invoke the curable provision in each and every case where the blunder is either by the prosecution or the court, it would arguably mean that the prosecution may honour the procedure or rules more often by breach rather than observance and this approach is certainly not what the curable provision would mean or intended to be used. The court must look at the particular case objectively without taking an extreme position to consider whether the defect could be cured. (See *S. Govindasamy v. Public Prosecutor* [1949] 15 MLJ 101 at p. 102).

Charge

[25] As for the charge, this court finds it contains two distinct offences and is a duplicity of the offence and the accuseds cannot plead guilty to a charge which is confusing and does not contain the correct ingredients of the offence intended by the prosecution and framed against the accuseds. In the instant case, the charge is the mixture of two offences, (1) possession of false National Registration Identity Card and (2) using the false National Registration Identity Card. Surely, in order to constitute an offence of being in possession of false National Registration Identity Card it does not require a further ingredient of making use of the false National Registration Identity Card as it contains two distinct and separate offences where each can stand on its own to disclose a particular offence. Accordingly, to include the word **'made use'** in the charge for possession of false National Registration Identity Card is unnecessary, confusing and embarrassing. (See *Hashim bin Mat Isa v. Public Prosecutor* [1950] 16 MLJ 94). The charge states that the accuseds were **in possession** and **made use** of false identity card which in the respectful view of this court is defective and it cannot be safely said that the accuseds were not misled by such error as the offence of **making use** of an identity card applies to a **forged identity c**ard and not to a false identity card. The wording "was **in possession**" and had **made use** are two distinct offences and cannot be lumped up in one charge to read possession and made use of the identity card which is false. In the respective view of this court, the wording of the charge is confusing, prejudicial, misleading and contrary to the requirement of the ingredients as required by s. 25(1)(e) of the National Registration Regulations 1990 and appears to be drafted without proper legal mind. In the circumstances, this court is of the view that the accuseds have been prejudiced, misled and it cannot be disputed that this has occasioned a miscarriage of justice. (See *Public Prosecutor v. Syed Bakri* [1932] MLJ xvii Vol xxl No: 6, *Chong Chee Pak v. Public Prosecutor* [1948-49] MLJ Supp 45, *Abdul Salam v. Public Prosecutor* [1955] 21 MLJ 116, *Lew Cheok Hin v. Reg* [1956] 22 MLJ 131, *Teo Peng Chow & Ors v. Public Prosecutor* [1957] 23 MLJ 118, *Chan Chong v. Public Prosecutor* [1957] 23 MLJ 246, *Low Seng Wah v. Public Prosecutor* [1962] 28 MLJ 107, *Tan Chin Keng v. Public Prosecutor* [1964] 30 MLJ 316, *Yoh Meng Heng v. Public Prosecutor* [1970] 1 MLJ 14, *Wong Siak Fon v. Public Prosecutor* [1972] 1 MLJ 203).

[26] Drafting correct charges and to have included all the required particulars and ingredients essential to the offence is an important part and responsibility of the prosecution and unless the charge is correctly drafted and contains all the essential ingredients of the offence and exclude all irrelevant ingredients, there can be no admission or plea of guilty to an offence which is not recognized in law and confusing and therefore the plea of guilty should not be accepted by the court. In the instant case, the accuseds were not represented by counsel at the Magistrate's Court and obviously did not object to the form of the charge as first, it was not explained to them in the language which they understood, secondly, they are not expected to know the legal implication of pleading guilty to a charge which is confusing and contains particulars of an offence which is not related and alleged to have been committed by them. Infact, it is certainly not the duty of the accuseds to perfect the charge for the prosecution and they are at liberty to take advantage of an imperfect or defective charge. (See *Rex v. Edwards* [1913] 1 KB 287 and *Rex v. Johnson* [1945] KB 424, *Pek Tin Shu & Another v. Public Prosecutor* [1948] 14 MLJ 110, *Wong Siak Fon v. Public Prosecutor* [1972] 1 MLJ 203).

[27] In *Mee Lian Co. v. Public Prosecutor* [1962] 28 MLJ 131, His Lordship Adams J said:

> I must yet again draw the attention of prosecuting officers to the necessity of drafting correct charges against the correct person and also of proving to the satisfaction of the court all the ingredients of the charge. Finally, it is the duty of the court to see that the charge is properly drawn at the time it is read and explained to the defendant. This clearly could not have been done in this case.

[28] In *Public Prosecutor v. Low Ah Sang* [1962] 28 MLJ 13 at p. 15, His Lordship Hashim J said:

> I shall now deal with the charge and the order of the learned President. In my opinion the charge was very badly drafted. In this respect I would commend all Presidents of Sessions Courts and Magistrates to read and digest the observations of the learned Chief Justice. In his oral judgment in *Public Prosecutor v. Syed Bakri* (Ipoh Criminal Revision No 3 of 1955 unreported), His Lordship said:

> I have repeatedly emphasised that in framing charges prosecution officers should adhere as closely as possible to the wording of the statute constituting the offence which is charged and the Magistrates should be at pains to see that this is done. If it is done, the prosecution know what they have to prove and the accused person knows what is charged against him. If it is not done, then there is the danger of the muddle of the sort that has come to light in this case,

[29] In *Subramaniam & Anor v. Public Prosecutor* [1976] 1 MLJ 76 at p. 78, His Lordship Ajaib Singh J (as he then was) had this to say:

> The framing of the charges in this case and the subsequent conduct of the proceedings in court left much to be desired. The administration of criminal law is not to be treated light-heartedly but is to be carried out seriously with a sense of dedication and with great care and attention.

[30] In *Heng Kim Khoon v. Public Prosecutor* [1972] 1 MLJ 30 at p. 31, His Lordship Sharma J said:

> In taking down a plea of guilty the use of the set formula:
>
> > Charge read over and explained to the accused and understood by him. Pleads guilty. Understands the nature and consequences of his plea. Plea accepted.
>
> should not be the result of sheer wont and habit as if it was an empty and meaningless ritual which the pen irresistibly begins to perform and complete once the magic words "I plead guilty" are uttered by the accused. The taking down of a plea of guilty is a solemn and serious act and the magistrates should devote some time and active thought before they decide to accept that plea and base a conviction thereon.
>
> A plea of guilty only amounts to an admission that the accused committed the acts alleged against him and not an admission of the guilt under a particular section of the Act. If he pleads guilty under an erroneous view of the law his conviction cannot stand. In such a case the plea of guilty does not avail because he cannot be said to have committed the offence in question in the eyes of the law. The appeal was allowed and the case was remitted back for retrial before another president.

[31] In *Heng Kim Khoon v. Public Prosecutor* [1972] 1 MLJ 30 at p. 31, His Lordship Sharma J referred to His Lordship's own decision in Malacca Criminal Revision No 4 of 1970 wherein His Lordship said: A

> I like to add that when an accused person pleads guilty it is the duty of the learned magistrate to carefully consider whether the accused fully understands the nature of the charge to which he pleads guilty. A plea of guilty, as has been said must be received with caution and generally the court should satisfy itself by putting questions to the accused in order to see whether he is aware of the facts on which the charge is founded against him and also whether he admits his guilt voluntarily without any extraneous pressure or expectation of a lesser sentence. An accused does not plead to a section of a criminal statute. He pleads guilty or not guilty to the facts alleged in the charge which in law are said to disclose an offence under the section named in the charge … It is the duty of the appellate court to see that the accused had not pleaded guilty on a misconception of law or that his conviction was not founded on such evidence which did not or could not constitute the offence under the charge. B C D

[32] In *Public Prosecutor v. LKI Holidays Leisure Sdn Bhd* [1998] 1 JCR 75; [1998] 1 MLJ 315 at p 79 (JCR); p 320 (MLJ), in dismissing the appeal on behalf of the Public Prosecutor, His Lordship Dato' Mohd Hishamudin J said: E

> This observation has been bothering me for quite some time and I think I should take the opportunity here to comment that prosecuting officers should not take the task of drafting charges lightly. The attitude that drafting charges is a mere mechanical task ought to be discarded. Prosecuting officers should take the task seriously. They should be meticulous and at the same time ensure that the provision of ss. 152, 153 and 154 of the Criminal Procedure Code (FMS Cap 6) (`the CPC') are strictly adhered to. They should, from time to time, seek the advice of the Public Prosecutor, especially when it concerns the drafting of less common offences (for instance, like the one in the present case). Magistrates too are under a duty to ensure at the commencement of any criminal case before them that the charge has been properly drafted. Should it come to the notice of the presiding Magistrate that the charge is defective, he should promptly bring it to the attention of the prosecuting officer, and thereafter take the necessary measures to rectify the defect. Let me remind Magistrates and prosecuting officers of the advice of Thomson J (who later became our first Lord President) given more than 40 F G H I

A years ago. (emphasis by this court). In his oral judgment in *PP v. Syed Bakri* (Ipoh Criminal Revision No 3 of 1955, unreported), his Lordship said:

> I have repeatedly emphasised that in framing charges prosecution officers should adhere as closely as possible to the wording of the statute constituting the offence which is charged and that Magistrates should be at pains to see that this is done. If it is done, the prosecution know what they have to prove and the accused person knows what is charged against him. If it is not done, then there is the danger of a muddle of the sort that has come to light in this case.

[33] In *Public Prosecutor v. Paghutheen* [1969] 1 MLJ 25 at p 26, His Lordship Ong Hock Sim J (as he then was) said:

> … where an accused person has been convicted by the Magistrate on his own plea of guilty and is precluded from appealing against the legality of the sentence under s. 305 of the States Code, the appellate court can always in a proper case exercise its powers of revision. I decided to revise this case. I find in the circumstances, justice is best done if I quash the conviction on these charges and order the fines to be refunded.

[34] In *Wong Siak Fon v. Public Prosecutor* [1972] 1 MLJ 203 at p. 205, His Lordship Lee Hun Hoe J (as he then was) said:

> In the present case although the appellant has no right of appeal against his conviction the appellate court is entitled to look into the record and, if there is any irregularity which occasions a failure of justice, the court will exercise its powers of revision.

[35] In *Mohd Dalhar bin Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 2 CLJ 209, His Lordship Gopal Sri Ram JCA in delivering the majority judgment of the Court of Appeal said:

> A court hearing an appeal against sentence is entitled to and will, where appropriate, act in revision and set aside a conviction.
>
> However, His Lordship had a qualification to this proposition when His Lordship said that:
>
> > save in exceptional cases and for very good reasons, there can be no resort had by a party to the revisionary jurisdiction of the High Court when the decision complained of is appealable and no appeal has been lodged.

[36] In *Habeeb Najar a/l Abdul Rashid lwn. Penguasa Komandan, Pusat Serenti Bukit Mertajam vide* High Court, Pulau Pinang Criminal Application No 44-12-49 (unreported), His Lordship Mohd Nor bin Haji Abdullah J (as he then was) said:

> Saya ingin mengambil kesempatan ini untuk memberi nasihat dan membuat teguran kepada setiap Majistret dan Hakim Mahkamah Sesyen supaya sentiasa merujuk kepada undang-undang statute yang terkini atau kemaskini.

[37] An accused must be sentenced on the basis of the offence to which he has pleaded guilty and which contains the essential ingredients of the offence and not on the basis of the offence apparently disclosed by the prosecution evidence which may point to a more serious offence or another distinct offence. (See *R v. Foo* [1976] Crim. LR 456, *R v. Fisher* [1982] Crim. LR 191 and *Chadderton* [1980] 2 Cr. App. R (S) 272). It is also important to observe that the court when evaluating the facts of the offence for the purpose of sentence must ensure that the version of the facts must be consistent with the facts those implied by the formal determination of guilt. The court cannot adopt or accept a version of the facts, whether on its own motion or on the suggestion of the prosecution, where it involves the assumption that the accused has committed either a more serious offence, a different kind of offence or similar offences more frequently, then is reflected in the decision; to do so would amount to depriving the accused of his right to be tried in respect of those offences. (See *Robinson* [1969] 53 Cr. App. R 314, *Lester* [1976] Crim. LR 389, *Huchison* [1972] 56 Cr. App. R 307).

[38] In the instant case, the charge is bad for duplicity. (See *R v. Wells, Ex Parte Clifford* [1904] 91 LT 98, *The King v. Edwards & Anor* [1913] 1 KB 287, *R v. Wilmot* [1933] All ER Rep 628, *Jagar Singh v. Public Prosecutor* [1936] MLJ Rep 92, *Thomson v. Knights* [1947] 1 KB 336, *Khor Ah Kah v. Public Prosecutor* [1964] 30 MLJ 309 at p. 310, *Tang Kee Chie v. Public Prosecutor* [1987] 1 MLJ 430 (cannot say that the accused did not suffer some degree of prejudice from the improper joinder of more than one offence), (*Yap Liow Swee v. Public Prosecutor* [1937] 6 MLJ (FMSR) 225) (it is a contravention of an express provision of the Code ie, s. 163 of the Criminal Procedure Code; it is a matter of substance and not of form; it creates uncertainty and embarrassment; it is a charge to which it is impossible to make a simple plea; it is an illegality and not curable under s. 422 of the Criminal Procedure Code which had occasioned a failure of justice, (*Rex v. Molloy*

A [1921] 2 KB 364). This court is of the view that this method of disposing of cases will continue and inevitably happen unless the court is vigilant and the prosecution reexamines its practice and pay serious attention to the drafting of charges and the preparation of facts.

B

[39] It is clear from the typed record of proceedings that the accuseds were found guilty and convicted not on one of the two distinct offences but rather on the defective charge as framed. This finding of this court is clear from the decision of the learned C Magistrate in which she said "Terima akuan salah OKT" "Salah dan sabit atas pertuduhan" and it does not state which accused or whether it referred to all the four accuseds as only the National Registration Identity Card of the first accused was tendered in court.". (See *Wee Hui Hoo v. Public Prosecutor* [1987] 1 MLJ 498). D It is important that the accuseds should know which of the two distinct offences is intended to be proved against them. Something is wanting, the want of which might cause injustice and the conviction cannot be supported. In the criminal justice system in this jurisdiction as it is in many jurisdiction abroad, it is not simply E whether the accused is guilty or not guilty, but whether the prosecution has framed a correct charge and the accused must be distinctly and properly charged. (See *Cotterill v. Lempriere* [1890] QBD Vol. xxiv 634).

F **[40]** On consideration of the particular section, being s. 25(1)(e) of the National Registration Regulations 1990 and the charge, this court is of the view that it contemplates two separate offences; (1) being in possession of false National Registration Identity Card and (2) making use of forged National Registration Identity card. G The two distinct offences are not necessarily committed by one and the same act; in other words, the act done may constitute one of the offences but may not constitute the other. An offender who is in possession of false National Registration Identity Card may not necessarily use it unless there is a statutory presumption. H That being so, it is obvious that the charge contemplates two distinct offences and is therefore bad for duplicity and could not properly be convicted on the defective charge (see *Rex v. Molloy* [1921] 2 KB 364). Section 163 of the Criminal Procedure Code provides that every distinct offence where a person is accused shall I be framed separately and there shall be a separate charge. Joinder of two distinct offences in one charge though may arise out of the same transaction and in disobedience to an express provision in

the Criminal Procedure Code cannot be said that it has not caused confusion or that failure of justice has not occasioned. (See *See Yew Poo v. Public Prosecutor* [1949] 15 MLJ 131).

[41] It is also appropriate to remind Magistrate of salutary rule which was highlighted by Thomson J (as he then was) in *Public Prosecutor v. Lim Chai Seng & Ors* [1956] 22 MLJ 236 at p. 237 where it is stated:

> Before departing from the cases I would point out that in each case a large number of particulars required to be entered on the Charge Sheet have not been entered, the most glaring of these omissions being any note of the Magistrate's finding. These Charge Sheets were introduced some years ago to ensure that all necessary particulars relating to criminal proceedings are recorded but this result which is a necessary one will clearly not be attained if Magistrates feel themselves at liberty to disregard the requirements of the Sheets.

[42] In the instant case, it is clear that the accuseds had pleaded guilty without understanding the nature of the charge or whether they had intended to admit that they were guilty to a charge which is defective and misleading. (See *The King v. Jones & Ors, Justices Ex Parte Thomas* [1921] 1 KB 632, *The King v. Surrey Justices, Ex Parte Witherick* [1932] 1 KB 450). It is obvious from the record of proceedings that the learned Magistrate did not keep clear in her mind that there were two distinct and separate offences contained in the charge and she had not considered them separately. Accordingly, she should have disregarded the allegation that the accuseds had made use of the National Registration Identity Card as it is a separate offence for which there were no facts to support it. Therefore, it cannot be said that the duplicity was merely an irregularity which can be cured under the provisions of s. 422 of the Criminal Procedure Code and that the accuseds were not prejudiced and it is impossible to say that failure of justice had not occasioned by the duplicity.

Facts

[43] Where an accused pleads guilty to a charge, it is a general rule that the prosecution should present facts of the case to support the charge upon which the court may find the accused guilty and so that the court will be able to appraise the situation in order to assess the appropriate punishment to be imposed in accordance to law. (See *Palan v. The Public ProsecuTor* [1932] MLJ 124, *Public Prosecutor v. Nahat Singh* [1939] 8 MLJ (FMSR) 239,

Public Prosecutor v. Chean Tin [1939] 8 MLJ (FMSR) 266, *Chin Ban Keat v. Rex* [1949] 15 MLJ 297, *Tukiran bin Taib v. Public Prosecutor* [1955] 21 MLJ 24, *Abdul Kadir Bin Abdul Rahman v. Public Prosecutor* [1984] 1 MLJ 80, *Lian Kian Boon v. Public Prosecutor* [1997] 1 MLJ 51). If the accused disputes the facts or attempts to challenge it or give an indication he is not sure of the facts or then admits the facts with qualification or his admission is not clear or doubtful, the duty of the court would be to simply reject his plea of guilty and set the case down for hearing. (See *Rex v. Lim Soon Gong And Two Others* [1939] 8 MLJ (SSR) 10 at p. 12, *Yeo Sim Huat & Ors v. Public Prosecutor* [1961] 27 MLJ 328, *Lau Eng Teck v. Public Prosecutor* [1965] 31 MLJ 34, *Heng Kim Khoon v. Public Prosecutor* [1972] 1 MLJ 30, *Public Prosecutor v. Cheah Chooi Chuan* [1972] 1 MLJ 215, *Ang Leong v. Public Prosecutor* [1985] 1 MLJ 239, *Lee Weng Tuck & Anor. v. Public Prosecutor* [1989] 2 MLJ 143 at p. 147, *Lim Soh Chwee, Braddel's Common Houses* 178, *Municipal Commissoners v. Chuah Seng & Ors* [1882] 2 Ky 140).

[44] On the other hand, if the accused especially the one who is not represented by counsel admits to the facts, it is still the duty of the court to be satisfied that the facts necessarily supports the charge. If the facts presented by the prosecution is contrary to the charge or does not support the charge or does not reflect the true and essential element or ingredients of the charge, the court has to reject the plea of guilty and set down the case for hearing. (See *Public Prosecutor v. Soon Tiew Choon* [1976] 1 MLJ 189, *Public Prosecutor v. Muhari Mohd Jani & Anor* [1999] 8 CLJ 430). Amongst others it is the duty of the court to ensure that the facts of the case as presented by the prosecution is explained to the accused and is understood by him so that he will be able to either admit the facts which must establish his guilt or dispute the facts and this can only happen if the facts are read, explained and understood by him. (See *Sebastian v. Public Prosecutor* [1968] 2 MLJ 214 at p. 215, *Lee Weng Tuck & Anor v. Public Prosecutor* [1989] 2 MLJ 143 at p. 147). (See *Low Hiong Boon (f) v. Public Prosecutor* [1948-49] MLJ Supp 135, *Public Prosecutor v. Tengku Hitam* [1962] 28 MLJ 414, *Lo Kim Peng & Ors v. Public Prosecutor* [1979] 1 MLJ 249, *Mohammad bin Hassan v. Public Prosecutor* [1997] 1 CLJ Supp 485).

[45] Facts presented by the prosecution, be it through writing or through documents which includes a police report as in the instant case must contain only facts which are relevant to the offence where the accused has pleaded guilty and not facts which are irrelevant to the offence and prejudicial in order to maintain proportionality between the sentence and the facts of the crime so as to ensure that no strained interpretation is put upon the facts (See *Veen v. The Queen (No. 2)* [1988] 164 CLR 465 at p. 472). Public interest demands that the courts should exercise its powers judiciously and not according to the wishes of one party where that wish if granted by the court is obviously and blatantly wrong in law and illegal. It requires no reminder that both defence counsel and prosecuting officers are officers of the court and they are expected to assist the court in arriving at a just decision and not to mislead the court for one's own agenda so that there will not be any accusation of biasness or undue delay. (See *Vellu Thevar v. R* AIR [1932] Rang 90).

[46] In order to be able to present the correct facts of the case, prosecuting officers have to be conversant with the facts of the cases before the cases are brought to court so that they will be able to assist the court in the disposal of the cases expeditiously with justice, fairness and without undue delay. (See *Public Prosecutor v. Soon Tiew Choon* [1976] 1 MLJ 189 at p. 190). Therefore, it is fundamental that where an accused has pleaded guilty to a charge, the brief facts given by the prosecuting officer must reflect the true and essential elements in the charge. The cumulative effect of the series of cases referred above insist on the proper facts to reflect the true and essential elements in the charge with a view of evaluating the facts of the offence for the purpose of sentence. The overriding rule is that the version of the facts adopted for the purpose of sentence must be consistent with those implied by the formal determination of guilt where the accused had pleaded guilty.

[47] In *Huang Chin Shiu v. Rex* [1952] 18 MLJ 7, Spencer Wilkinson J (as he then was) said:

> After an accused has pleaded guilty, if the statement by the prosecuting officer of the facts of the case made for the purposes of sentence does not in itself disclose an offence, this should put the Magistrate on his inquiry, but it is not necessarily a sufficient ground upon which an Appellate Court will allow the accused to withdraw his plea of guilty.

[48] In the instant case, the learned Magistrate with respect seem not to have considered or read carefully herself the charge and is a case where she is seen to have gone on a mechanical exercise of her powers and the proceedings have been hurried or carried out in this unjudicial fashion which is not appropriate in our judicial system. It is the duty of this court where matters of similar nature as in the instant case has come to light to correct the wrong so as to put it right and in accordance to law. The seat which I am seated is to ensure that justice is seen to be done in the context of administration of justice and not to seek for popularity either within the institution or outside the corridors of the court or to please or quieten the public gallery so that the independence of judge's decision will at all times be maintained. This court is mindful and accepts the fact that all decisions of this court are subjected to be reviewed on further appeal and if necessary reversed but the decision of this court must be free of fear or favour. Chief Justice Arthur T. Vanderbilt of the New Jersey Supreme Court when he delivered a series of lectures at the University of Virginia said:

> It is the courts and not in the legislature that our citizens primarily feel the keen, cutting edge of the law. If they have respect for the work of the courts as it affects them, their respect for law will survive the shortcomings of every other branch of government; but if they lose their respect for the work of the courts, their respect for law and order will vanish with it.
>
> Judges learned in the law, not merely the law in books but, something far more difficult to acquire, the law as applied in action in the courtroom; judges deeply versed in the mysteries of human nature and adept in the discovery of the truth in the discordant testimony of fallible human beings; judges beholden to no man, independent and honest and-equally important-believed by all men to be independent and honest; judges, above all, fired with consuming zeal to mete out justice according to law to every man, woman and child that may come before them and to preserve individual freedom against any aggression of government; judges with the humility born of wisdom, patient and untiring in the search of truth, and keenly conscious of the evils arising in a workaday world from any unnecessary delay-judges with all these attributes are not easy to find, but which of these traits dare we eliminate if we are to hope to attain even handed justice?

[49] Under the circumstances, this court is of the view it is unsafe and unsatisfactory to allow the plea of guilty to be sustained. In the court's view, if the plea of guilty is allowed to remain, there is likely to be some lurking doubt whether the entire procedure of taking the plea of the accuseds were correct and whether the accuseds understood the charge, nature and consequences of the plea and consequently whether the policeman who acted as interpreter and the accuseds understood each other. This court is very much in doubt whether the accuseds understood to what offence they had pleaded guilty. (See *Rex v. Forde* [1923] 2 KB 400). Therefore, this court finds that the conviction constituted a miscarriage of justice, unsafe and unsatisfactory to be sustained. This court is of the view that many appeals and revisions would be saved if only Magistrates ensure that an accused has a fair trial and treatment and the charge produced against him is determined fairly and justly and in accordance with the settled principles of law and at all times Magistrates must be vigilant and must have a "razor sharp mind and rapier like tongue".

Retrial

[50] Ordinarily and in a situation as in the instant case, this court would have rejected the plea, record a plea of not guilty, directed a retrial and remitted the case back to the Magistrate's Court. (See *Public Prosecutor v. Mohamed Tarmizi* [1985] 1 MLJ 219). However, in the instant case, there are too many unsatisfactory features to order a retrial which will be most unfair to the accuseds, first, the charge itself did not disclose the correct ingredients and contains two distinct offences, secondly, the accuseds had already been under remand from 22 September 2005 and had served the sentence for a period of three weeks, thirdly, the charge is defective, fourthly, admittedly there is no facts to support the charge, fifthly, it is not in the interests of justice to order a retrial. (See *Zahari bin Yeop Baai & Anor v. Public Prosecutor* [1980] 1 MLJ 160 at p. 163, *Chee Chiew Heong v. Public Prosecutor* [1981] 2 MLJ 287). Before concluding this matter, it is necessary to place in record the candid submission by learned Deputy Public Prosecutor, Dato' Abdul Rahman Putra that the charge against the accuseds was unsustainable. In this respect, this court wishes to refer to the case in *Public Prosecutor v. Anthony* [1972] 1 MLJ 229 at p. 330, where His Lordship Sharma J said:

The charge was consequently baseless and the accused was wrongly convicted thereon even though he had pleaded guilty. I need not repeat what I have already said on several occasions that it is the duty of the magistrates to exercise a good deal of care in accepting a plea of guilty. Again no facts seem to have been recorded by the learned magistrate. It may and does sometimes become dangerous to convict an accused merely on his plea of guilty without recording any facts and this case is illustrative of the danger inherent in that practice. If the learned magistrate had taken the precaution to ask for facts and a copy of the order referred to in the charge was produced it would with ease have become plain and apparent that there in fact existed no such order as was referred to in the charge. I regret the liberty of a subject has by the lack of ordinary and requisite care expected of the courts in every case been imperiled and unnecessarily interfered with. I may also take this opportunity to say that the prosecution itself should exercise a lot more care and vigilance in framing a charge against an accused. The object of a charge is to give notice to the accused of the essential facts constituting the offence which he is alleged to have committed and the law he has violated. The charge should be capable of being substantiated with as much evidence as is available to the prosecution. It is not enough merely to say that some offence has been committed by the accused. He is required to answer a specific charge and meet the specific allegations in the charge and pointedly plead thereto alone.

I am, however, thankful to the learned deputy for having at this stage very candidly conceded that the charge against the accused was wrong in law and unsustainable. But for the manly and scrupulous honesty with which the learned deputy has acknowledged the folly of the charge and the futility of the prosecution case it would have been impossible for me to know the facts relied upon by the prosecution. I commend the spirit in which the information has been given to the court. Fairness should characterize every prosecution. The magistrates (and judges as well), like all human beings, at times are apt to fall into error and take the wrong sow by the ear. Injustice is thus prone to result in those cases where the court slips into such error. It however adds to the stature, luster and dignity of man if once that mistake is discovered, detected or brought to his notice he does not hesitate to own it. The learned magistrate deserves credit for having brought this matter to the High Court and the learned deputy equally great credit for having stated the correct position so that the mistake already made could be rectified and the accused restored to his freedom. The order of the learned magistrate is set aside and the conviction against the accused quashed.

[51] In *Tang Hee Hing v. Public Prosecutor* [1991] 1 MLJ 402 at p. 404, His Lordship Hashim Yeop A. Sani CJ (Malaya) said:

> Where the trial court has accepted an imperfect plea the appellate court may quash the conviction and has a discretion to order or not to order a retrial. In the light of what was stated earlier with regard to the plea, it was our view that the conviction was not a true and satisfactory conviction and should be quashed.

[52] In the circumstances, the conviction against all the four accuseds is quashed and the sentence is set aside and the fines if paid is ordered to be refunded to the accuseds. On the facts and the circumstances in the instant case, there will be no order for retrial.